BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES N. KERRIN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2002-519748** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 26, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on November 8, 2007. Claimant was present and represented by Louis Garbrecht of Coeur d'Alene. Thomas W. Callery of Lewiston represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Employer/Surety settled prior to hearing. Oral and documentary evidence were presented. The record remained open for the taking of two post-hearing depositions. The parties submitted post-hearing briefs and this matter came under advisement on April 2, 2008.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether Claimant is totally and permanently disabled, and, if so
2. Whether ISIF is liable pursuant to Idaho Code § 72-332, and
3. The application of the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled by either the 100% method or by the odd-lot doctrine. He has had a number of industrial accidents and injuries that have resulted in impairments and hindrances to his employment or re-employment that have combined with his last industrial accident to render him a "total" and invoke the liability of ISIF.

ISIF contends that Claimant is not a total under either the 100% method or the odd-lot doctrine. The main thrust of their argument is that Claimant has not looked for work since his 2002 accident and it would not have been futile for him to do so in the thriving Coeur d'Alene area economy. The most debilitating of Claimant's restrictions are self-imposed and when objective medical restrictions are considered, there are many jobs available to Claimant.

Claimant counters that the only physicians to assign light-to-medium work restrictions did so before Claimant's last back surgery, and the only physician to address disability post-last surgery opined Claimant was totally and permanently disabled. Further, ISIF's vocational expert agreed that when considering Claimant's subjective perception of his restrictions, he is unemployable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Judith, taken at the hearing.

2 Claimant's Exhibits A-V admitted at the hearing.

3. ISIF's Exhibits 2-7 admitted at the hearing, and Exhibit 1 admitted during the deposition of Nancy Collins, Ph.D.

4. The post-hearing deposition of Tom L. Moreland, taken by Claimant on November 16, 2007, and that of Nancy J. Collins, Ph.D., taken by ISIF on December 10, 2007.

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After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 50 years of age and resided in the Coeur d'Alene area with his wife in a motor home at the time of the hearing.

2. Claimant's relevant work history consists of general laborer and oiler at lumber mills, cabinetry, and granite installation and fabrication; all heavy-to-very heavy work.

3. Claimant has suffered various injuries resulting in surgeries during his work life that may be summarized as follows:

1989 - Back surgery.

1997 - Right knee surgery.

1999 - Right bicep tendon rupture repair.

2002- Left shoulder surgery.

2005 - Lumbar fusion resulting from 2002 back injury.[1]

2007- Right knee replacement.

4. ISIF concedes that Claimant's low back, right biceps, and left shoulder injuries have resulted in pre-existing permanent physical impairments that are manifest and have constituted hindrances to employment or re-employment, and the Referee so finds. *See*, ISIF's post-hearing brief, p. 17.

DISCUSSION AND FURTHER FINDINGS

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden,

[1] On September 23, 2002, Claimant injured his back while lifting a granite island countertop. Claimant has not returned to work following this accident and injury.

then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent

physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and,

4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990).

The crux of this matter is whether Claimant is totally and permanently disabled. He contends that he is either by the 100% method or by the odd-lot doctrine.

100% method:

5. According to Claimant, he has pre-existing whole person permanent physical impairments totaling approximately 48%. Assuming that to be the case, non-medical factors must account for 42% to equal 100%. As discussed in more detail below, the Referee is not persuaded that Claimant's non-medical factors reach that level. The objective physical limitations resulting from his various injuries place him in the light-to-medium work categories. There are an abundance of jobs in the Coeur d'Alene/Spokane area labor market within Claimant's objective restrictions. Claimant has failed to identify non-medical factors that would constitute the remaining 42% necessary to equal 100%.

6. Claimant has incurred permanent partial disability to some degree above his impairment but less than total; however, because Employer/Surety has settled, it is unnecessary to quantify that disability.

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Odd-Lot:

Although Claimant has failed to establish that he is totally and permanently disabled by the 100% method, he may still be able to establish such disability via the odd-lot doctrine. An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction,* 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

7. As indicated above, ISIF has conceded that Claimant has satisfied the first three prongs of the *Dumaw* test, but deny that Claimant is totally disabled under the odd-lot doctrine primarily because Claimant has not looked for work since his September 23, 2002, back injury and that it would not have been futile for him to have done so. In that regard, ISIF retained Nancy Collins, Ph.D., to prepare an employability analysis. Dr. Collins prepared a report and was deposed.

8. Dr. Collins, whose credentials are well known to the Commission, reviewed medical records, Industrial Commission Rehabilitation Division records, Social Security records, Claimant's deposition transcript, Claimant's vocational expert's deposition testimony, and met with Claimant. She noted Claimant's relevant prior work history was in the heavy-to-very heavy categories and that he could not return to his previous occupations. She summarized Claimant's objective, i.e., physician-based, physical restrictions as follows:

1990 – Back: lifting 100 pounds, 150 pounds occasionally, no repeated bending and stooping.

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1997 – Knee: no impact activities, i.e., jumping or running.

1997 - Back: no lifting over 50 pounds, occasional lifting to 50 pounds (for 1990 back injury).

1999 – Right biceps tendon: can lift up to 100 pounds.

2002 – Left shoulder: no prolonged overhead use of the left arm or lifting over 50 pounds.

2003 - Back: no lifting over 25 pounds, avoid torquing maneuvers, and provide ad lib position changes.

Subjective limitations: Claimant does not believe he is employable due to muscle spasms in his back that are unpredictable and require that he lie down to relieve the pain. Claimant does not believe he would be a reliable employee due to this and a perceived high rate of absenteeism.

9. Dr. Collins concurs that if the Commission accepts Claimant's description of his perceived limitations, he is probably unemployable. However, Dr. Collins testified as follows regarding Claimant's employability when considering all of the various physicians' restrictions:

> Q. (By Mr. Callery): What's your overall opinion of this gentleman's employability in 2007 in Kootenai County?
>
> A. Based on the restrictions that we have, the specific restrictions, he should be able to go and find a job, especially in this labor market because it is so good. But, I mean, even if there was just a normal labor market, there are just a lot of light/light medium jobs out there that I think he's capable of doing. He doesn't have a hearing impairment. His upper extremities work. You know, he's got good communication skills. So, all of those things, you know, would make opportunities available to him.
>
> If we look at what he feels he can do, it would be difficult for him to work.

Dr. Collins' Deposition, p. 34.

10. Claimant retained vocational counselor Tom L. Moreland, whose credentials are well known to the Commission, to provide an opinion regarding Claimant's employability. He

reviewed medical records and interviewed Claimant. He did not author a report, but was deposed. Mr. Moreland agrees that there are jobs available assuming Claimant can perform light-to-medium work as the physicians' restrictions indicate that he can:

> Q. (By Mr. Garbrecht): Mr. Moreland, if Mr. Kerrin was able to perform light to medium work, what kind of jobs would be out there and what would they pay?
>
> A. First of all, if he could perform what we call a full scope of light to medium work, he would be employable, there would be a significant labor market both in Coeur d'Alene - - we keep forgetting Spokane, too, but considering those two, there would be a significant labor market.

Mr. Moreland's Deposition, p. 27.

11. Mr. Moreland opined that Claimant's disability will vary depending upon whether the physician's restrictions are used, or whether Claimant's perception of his restrictions are used. If Claimant's perception is used, he is unemployable.

12. Of concern in this case is the lack of evidence regarding just what Claimant is, or may be, capable of doing work-wise. The only "restriction" post-fusion came from Dr. McNulty, an orthopedic surgeon in St. Maries, who performed an IME at Claimant's request on September 25, 2006. Rather than assigning any specific work restrictions or discussing any specific limitations, Dr. McNulty merely concludes, without explanation, that Claimant is totally and permanently disabled. There is no foundation for his opinion, nor is there any foundation establishing his expertise in vocational issues. His opinion in that regard is given no weight and is not corroborative of Claimant's perception of his limitations.

13. Claimant worked with ICRD consultant Dirk Darrow for a time, pre-fusion. Mr. Darrow was also somewhat confused regarding the exact nature of Claimant's restrictions and requested that Surety arrange for a functional capacities evaluation; they declined. Mr. Darrow closed his file when Claimant indicated that he was unable to work. Claimant was

also provided the services of the Idaho Division of Vocational Rehabilitation for potential retraining, but there is no evidence that he followed through. Both Dr. Collins and Mr. Moreland indicated that Claimant would have been a good candidate for that program.

14. Generally, the Commission will consider a claimant's subjective perception of his or her limitations, but in conjunction with physicians and/or physical therapists' opinions regarding the same. Here, we have medical-based restrictions placing Claimant in the sedentary-light-medium work categories, while Claimant posits that he cannot work at all. The Referee gets the impression that once Claimant knew he was precluded from returning to the heavy-to-very heavy work in granite installation and fabrication that brought him a great deal of physical and mental satisfaction,[2] and began receiving Social Security Disability benefits, he simply gave up and did not explore lighter-duty work.

15. Claimant is a very personable individual. He presents well, is extremely articulate, is intelligent, is capable of learning with two years of college, and has had supervisory experience. He knows the ins and outs of cabinetry and granite fabrication and would be invaluable in some lighter duty capacity within those trades. While his age may be a factor, he still has a lot of work life ahead of him.

16. The Referee is not convinced that it would have been futile for Claimant to have searched for work and attempted work, had his work search been successful. At least by having tried work in another area than his previous employment, a better understanding of what he can and cannot do physically would have been gained. As it is, the Commission is left solely with

[2] Claimant was nicknamed "Forklift" by co-workers for his ability to lift very heavy objects. At the time of the hearing, he stood 6'5" tall and weighed between 285-290 pounds and, even though he had not worked since 2002, the Referee observed very little fat. He referred to himself as a "craftsman artisan."

Claimant's own perception of his physical limitations, and to base a finding of total disability on that factor alone is not a road the Commission wishes to travel.

17. Claimant has failed to prove he is totally and permanently disabled.

18. Based on the above finding, the issues of ISIF's liability and the application of the *Carey* formula are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is totally and permanently disabled.

2. The issues of ISIF's liability and the application of the *Carey* formula are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __19th____ day of September, 2008.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES N. KERRIN, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	)	**IC 2002-519748** **ORDER** Filed September 26, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he is totally and permanently disabled.

2. The issues of ISIF's liability and the application of the *Carey* formula are moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __26th____ day of _____September_____, 2008.

INDUSTRIAL COMMISSION

___/s/_____
James F. Kile, Chairman

___/s/_____
R.D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26th__ day of ____September____ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

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